IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL ANTHONY BURNHART, Appellant.	No. 33316-3-II UNPUBLISHED OPINION

HOUGHTON, P.J. -- Michael Burnhart appeals his conviction of three counts of third degree child rape and two counts of third degree child molestation, arguing that the trial court erred in admitting evidence. Pro se, he also raises additional grounds for reversal. We affirm.

FACTS

On December 10, 2002, Burnhart and his younger son, Robert, moved into Debra Post's home, expecting to stay for a few days. At that time, Post lived with her husband, her mother-in-law, and her 14-year-old daughter, AG. Post's son, Michael Wescott, was out of town but returned home a few days later.

On December 27, Burnhart's older son, Adrian, also came to live with them. Adrian was 15 and had been AG's boyfriend off and on for more than two and one-half years. Because of the lack of space, Burnhart and his sons kept some of their clothes in AG's bedroom.

As Burnhart's stay lengthened, AG began to spend more time with him and his sons, going to the movies or the park together. On several occasions, Post and Wescott saw Burnhart leave AG's bedroom. According to Wescott, Burnhart once told him that he loved AG and wanted to marry her. Post and Wescott asked AG about her relationship with Burnhart, but she refused to talk with them about it.

After moving out of Post's home in March 2003, Burnhart continued to meet AG and, through Robert, sent her love letters signed in different names. AG returned the letters to Burnhart, but Post retrieved them.

Post obtained a restraining order against Burnhart after AG revealed her sexual relationship with him. AG also testified at trial that she had vaginal and oral intercourse with him almost every day while he resided at her home.

On January 23, 2004, the State charged Burnhart with three counts of third degree child rape and two counts of third degree child molestation.[1] On November 23, he filed a "Motion to Allow Evidence of Specific Instances of the Alleged Victim's Past Sexual Behavior Subject to RCW 9A.44.020 Pursuant to State Rule 412" and "Part II Written Offer of Proof. Subject to Motion to Allow Victims [sic] Past Sexual Behavior Pursuant to 412.4."[2] Clerk's Papers (CP) at

[1] On February 2, 2005, the State filed an amended information that included the following aggravating circumstances in each count: (I) "the defendant's conduct during the commission of this offense manifested AN ABUSE OF TRUST"; (II) "the defendant's OFFENDER SCORE WILL BE ABOVE NINE POINTS"; and (III) "this offense was PART OF AN ONGOING PATTERN OF SEXUAL ABUSE OF THE SAME VICTIM UNDER THE AGE OF EIGHTEEN YEARS MANIFESTED BY MULTIPLE INCIDENTS OVER A PROLONGED PERIOD OF TIME." Clerk's Papers at 147-50.

[2] On December 14, 2004, Burnhart voluntarily waived his right to counsel and the court allowed him to proceed pro se.

59-60. In his pro se pleadings, he claimed "[t]he victim has accused four other people [of] raping her (Michael Wescott Brother) (Skylar Henery) [sic] (Clay) (Joel Repp) ex Room Mate Level 3 Sex Offender." CP at 60.

On December 28, he filed another motion titled "Request for Hearings on 404.B, 412, Miranda Hearing Pursuant to State Rules of Evidence and Fed. R. Evid.," requesting the court's permission to bring AG's "past behavior (sexual)" into evidence. CP at 124, 127.

At a hearing on the motions, the trial court asked Burnhart if he had any proof of the alleged past sexual behavior. In response, he merely stated that AG told him and his son, Adrian, about these incidents in which other men had raped her. He also admitted that he had "limited . . . access of information." 1 Report of Proceedings (RP) at 29-30.

The trial court denied the motions, ruling:

> Well, looking at what's called the "rape shield statute," which is 9A.44.020(2), it appears to me that very little of this would be admissible. If we're talking simply about past sexual activity, there's kind of a "who cares" quality. It's not relevant to this charge.
>
> Now, if you can, in fact, show a pattern of false accusations of sexual misconduct against someone else, that might possibly be relevant, but the fact that she says she had dated Skylar Henry, that doesn't tell us anything. If you can show that she falsely accused him of rape or sexual misconduct for some kind of gain, I can see theoretically that that might have something to do with the issue, but I don't see what it is so far.
>
> If Clay Newberg raped her, I don't see that that tells us anything about whether you did. And Michael Wescott, a friend of the family. And if these weren't reported to the police, then it's kind of hard to see that there was a false accusation since accusations weren't made to the prosecuting authorities.
>
> So at this point, absent some showing, it seems to me that all these are barred by RCW 9A.44,020, and I'm going to direct both sides not to make any mention.
>
> . . . .
>
> It seems to me that all these that you're mentioning here are barred by the rape shield statute, so I'm going to prohibit mention of them.

1 RP at 35-36.

A jury convicted Burnhart of all charges and found eight out of a possible ten aggravating factors.[3] The court sentenced him to 60 months' incarceration, the high end of the standard range, on each count.[4] Burnhart appeals.

ANALYSIS

False Rape Accusations

Burnhart first contends that the trial court denied him his constitutional right to present a defense when it excluded evidence regarding AG's alleged accusations of rape against other individuals. He asserts that the rape shield statute[5] did not apply and that the evidence was admissible under ER 403 and ER 608.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court also reserves the discretion to determine relevancy. *State v. Demos*, 94 Wn.2d 733, 736, 619 P.2d 968 (1980). A trial court abuses its discretion when it bases its decision on manifestly unreasonable or untenable grounds. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999).

---

[3] There were two aggravating factors for each of the five counts: (1) whether Burnhart's offense was part of an ongoing pattern of sexual abuse manifested by multiple incidents over a prolonged period of time and (2) whether the offense constituted an abuse of trust.

[4] Burnhart's sentences of 60 months for each of the five counts will be served concurrently because the court declined to impose an exceptional sentence under RCW 9.94A.589(1).

[5] The rape shield statute, RCW 9A.44.020 provides in relevant part:

> (3) In any prosecution for the crime of rape . . . evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim.

On appeal, Burnhart relies on *Demos*, arguing that the rape shield statute does not apply to evidence of a rape victim's previous false rape accusations against other individuals. In *Demos*, our Supreme Court held:

> For the statute to be applicable the evidence must relate to the victim's past sexual behavior. Whether the victim's past sexual behavior includes prior false rape reports is the obvious issue. Several courts have held that rape shield laws do not exclude evidence of past false rape accusations, *Commonwealth v. Bohannon*, 376 Mass. 90, 378 N.E.2d 987 (1978), *People v. Mikula*, 84 Mich. App. 108, 269 N.W.2d 195 (1978), but we do not reach that question since the offered evidence did not prove falsity and therefore was irrelevant.

94 Wn.2d at 736.

Burnhart claimed that AG made four false accusations of rape against others and that two of the incidents were reported to the police. During a pretrial argument, when the trial court asked about his proof, Burnhart could not provide any evidence on the falsity of these alleged rape accusations. And at trial, Burnhart offered no proof of the accusations, let alone their falsity.

The trial court ruled that the rape shield statute barred admission of any evidence of AG's past sexual activity unless Burnhart could show that there was a pattern of her making false sexual accusations. The parties did not cite *Demos* below and the trial court did not rely on it for its ruling. Nevertheless, *Demos*, and not the rape shield statute, provides the proper grounds for excluding the evidence. Because Burnhart presented no evidence that the accusations were false, they bore no relevance to the case and the trial court did not err in excluding the evidence at trial.[6]

[6] Although the trial court excluded the evidence on the wrong basis, we can affirm on any other proper ground. *State v. Ellis*, 21 Wn. App. 123, 124, 584 P.2d 428 (1978) ("if the judgment of a trial court can be sustained on any grounds, whether those stated by the trial court or not, it is our duty to do so").

Statement of Additional Grounds

Offender Score

In his Statement of Additional Grounds (SAG),[7] Burnhart argues that the trial court miscalculated his offender score when it failed to apply the same criminal conduct analysis to his prior and current offenses. He asserts that the trial court should have treated all his current convictions as the same criminal conduct for sentencing purposes.

Generally, the trial court determines the sentence range for each current offense by adding together the offender score from all other current offenses and prior convictions. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). But if the trial court finds that all or some of the current offenses encompass "the same criminal conduct," then those offenses count as one crime. RCW 9.94A.589(1)(a).

The statute defines "same criminal conduct" as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Absent any one of these elements, the trial court must score each offense separately. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). We will not disturb a trial court's determination regarding same criminal conduct absent a clear abuse of discretion or a misapplication of the law. *State v. Calvert*, 79 Wn. App. 569, 577, 903 P.2d 1003 (1995), *review denied*, 129 Wn.2d 1005 (1996).

In *State v. Dolen*, 83 Wn. App. 361, 362-63, 921 P.2d 590 (1996), *review denied*, 131 Wn.2d 1006 (1997), a jury convicted the defendant of one count of child rape and one count of child molestation based on evidence of six separate incidents of child sexual abuse. The *Dolen*

[7] RAP 10.10.

court observed that the record did not indicate whether the jury convicted the defendant of committing the two offenses in a single incident or in separate incidents. 83 Wn. App. at 365. The *Dolen* court concluded that if the jury convicted the defendant of both offenses for the same incident, the crimes encompassed the same criminal conduct because the victim, time, place, and intent were the same. 83 Wn. App. at 365. Because the State failed to prove that the defendant committed the crimes in separate incidents, the appellate court vacated the sentences. *Dolen*, 83 Wn. App. at 365.

Here, unlike in *Dolen*, sufficient evidence separated the three rape charges. The "to-convict" instructions specified that the three child rape charges comprised different incidents. The State had to prove penile/vaginal intercourse for count I, oral/vaginal intercourse for count II, and digital/vaginal intercourse for count III. The prosecutor also differentiated these counts during its closing argument. Further, AG's testimony implied that these different types of intercourse happened during separate incidents. Combined, these show that the jury did not convict Burnhart of counts I, II, and III based on the same criminal conduct.

Moreover, Burnhart waived his same criminal conduct claim. In *In re Pers. Restraint of Goodwin*, our Supreme Court noted that "waiver may be found in a case . . . where the defendant argued for the first time on appeal that the two crimes he was convicted of constituted the same criminal conduct, and therefore neither could not be counted as part of his offender score for sentencing for the other crime." 146 Wn.2d 861, 875, 50 P.3d 618 (2002). According to the *Goodwin* court, "application of the same criminal conduct statute involves both factual determinations and the exercise of discretion." 146 Wn.2d at 875. Accordingly, Burnhart waived his same criminal conduct claim because he failed to raise a factual dispute or to request

the trial court to exercise its discretion.

Turning to the second part of Burnhart's argument, even if we assume that Burnhart correctly argues that counts IV and V constitute the same criminal conduct[8] and one of his five prior convictions is a misdemeanor,[9] his offender score argument fails because he still has an offender score of 10. That offender score derives from his three current sexual offenses, each of which count as three points, and four prior felony convictions. RCW 9.94A.525(16). Because his offender score is greater than nine, the maximum offender score that could increase his sentence, the trial court did not err in calculating his offender score.[10] Former RCW 9A.94.510 (2002).

Expert Witnesses

Burnhart next argues that the trial court denied him his state and federal constitutional right to present a defense when it declined to pay for his expert witnesses. He also argues that the trial court erred in denying a motion for a continuance when an expert offered to testify for free.

In Washington, an indigent defendant may request payment for an expert's service when it is necessary to present an adequate defense. CrR 3.1(f); *State v. Young*, 125 Wn.2d 688, 691, 888 P.2d 142 (1995). "Whether expert services are necessary for an indigent defendant's

[8] The State charged him with touching AG's breasts in count IV and of AG's touching his penis in count V.

[9] Burnhart also asserts that the court erred by counting his non-felony conviction as an offender score. But, as analyzed above, whether the court took into account his non-felony convictions remains irrelevant because Burnhart has an offender score greater than nine.

[10] Moreover, Burnhart received a 60-month sentence, one within the standard range for an offender score of seven, because his current offenses are class C felonies and the statutory maximum for a class C felony is 60 months. Former RCW 9.94A.510(3)(g) (2002); former RCW 9.94A.510(4)(c) (2002).

adequate defense lies within the sound discretion of the trial court and shall not be overturned absent a clear showing of substantial prejudice." *Young*, 125 Wn.2d at 691. Generally, "CrR 3.1(f) does not mandate appointment of an expert at public expense unless such services are necessary to an adequate defense." *Young*, 125 Wn.2d at 692. "[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

The record does not support Burnhart's argument. He asserts that the trial court denied his requests for a handwriting expert who could testify that some of his purported love letters have been altered and for a doctor who could testify that he was "unable to sustain an erection." SAG at 10. But nothing in the record shows that the trial court denied him any opportunity to obtain expert service. Rather, the trial court indicated that it would sign an order for the Department of Assigned Counsel to pay for his doctor. Further, the State did not object to his calling a handwriting expert; nothing shows that the trial court declined to order payment for one.

Even if we assume that the trial court declined to order payment for these experts, it did not commit reversible error given its broad discretion. The State properly laid a foundation for all of the individual letters, and Burnhart offered no reason for the trial court to believe that he would be unable to present an adequate defense without a handwriting expert.

And regarding his claim for a doctor, Burnhart read his medical records to the jury. The record stated: "He found himself with times unable to vaginally penetrate. He is able to have an erection and become erectile but soft. Manually, he has [sic] able to have ejaculation without any difficulty." 6 RP at 581.

Burnhart did not provide any reason for the trial court to believe that his doctor would

present further information without which he would not be able to adequately defend himself. Thus, the trial court did not abuse its discretion and Burnhart's argument fails.[11]

Exculpatory Evidence

Finally, Burnhart argues that the trial court denied his constitutional right to a fair trial when it denied his motion for a new trial or a hearing on his claim that the State failed to disclose potentially exculpatory evidence before trial. According to Burnhart, the State concealed evidence that Detective Harai, the lead detective who had custody of Burnhart's purported love letters, was suspended from his job around the time of the arrest. Burnhart asserts that this situation created a problem with the chain of custody for the letters.

Burnhart's argument lacks merit. The suppressed evidence must be material before a defendant may claim prejudice from the failure to disclose it. *Banks v. Dretke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004); CrR 4.7(e)(1). "[T]the materiality standard . . . is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks*, 540 U.S. at 698 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)); *State v. Thomas*, 150 Wn.2d 821, 850, 83 P.3d 970 (2004). The mere possibility that undisclosed evidence may have helped the defense does not establish materiality. *Kyles*, 514 U.S. at 436-37 ("the Constitution is not violated every time the government fails or chooses not to disclose

[11] Similarly, no record before us shows whether the trial court denied a continuance motion to accommodate an expert's schedule. Even if it did deny such a continuance, the trial court would not have abused its discretion for the reasons stated above.

evidence that might prove helpful to the defense"); *State v. Blackwell*, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993).

Here, Burnhart seems to assert that there may have been letters that Harai failed to put into evidence. Even if we assume, for the sake of argument, that Harai did not give the State some of the letters, Burnhart fails to show whether any of these omitted letters could have contained information material to his defense. Given that he authored all of the letters, it would not have been difficult for him to point out how the omitted letters could have been material. But he failed to do so.

At trial, he merely said: "The state agent, i.e. Detective Harai, had evidence that was never disclosed to the defense. . . . If he has letters that the State never introduced, that evidence is either inculpatory or exculpatory. I don't know. We haven't seen it." 9 RP at 719. That Harai was the lead detective and had custody of the letters for a period of time insufficiently establishes materiality. Although Burnhart claimed during trial that some of the letters were altered, he failed to demonstrate how this could be relevant to Harai's suspension.

As previously stated, the State laid a foundation for all the letters admitted into evidence. The mere possibility that there might have been more letters does not undermine confidence in the verdict. Moreover, because the State did not call Harai to testify at trial, his credibility was not an issue and the State had no reason to explain his suspension. The trial court did not err by denying Burnhart's motion for a new trial.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

_____
Houghton, P.J.

We concur:

_____
Bridgewater, J.

_____
Hunt, J.